Akinyele v. Keisler, No. 06-74478

N.R. SMITH, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority that Akinyele's notice of appeal did not sufficiently apprise the BIA of the issues on appeal. However, I would hold that summary dismissal was inappropriate because the BIA violated Akinyele's due process rights by not setting a new briefing schedule when it reinstated his appeal.

On July 24, 2006, Akinyele timely appealed to the BIA an IJ's decision finding Akinyele removable and denying his requests for asylum, protection under the Convention Against Torture, and withholding of removal. In his Notice of Appeal, Akinyele checked the appropriate box indicating that he intended to file a brief in support of his appeal. On August 18, 2006, the BIA set the briefing schedule, giving Akinyele until September 8, 2006 to file his brief. Akinyele admits he received the briefing schedule on August 24, 2006.

Also on August 24, 2006, an unknown party filed a Motion to Withdraw Akineye's appeal. A week later, on August 31, 2006, the BIA granted the Motion to Withdraw and dismissed Akinyele's appeal. After learning that his appeal had been dismissed, Akinyele filed a Motion to Reopen with the BIA on September 13, 2006 – five days after the original deadline to file a brief. In his Motion to Reopen, Akinyele wrote:

Respondent ask the board to reopen his appeal as *he has currently*

> *requested the board for an extension of his briefing schedule* which he received on the 24th of August. Respondent ask the board to open his appeal and *grant him the extension he requested* (1) Petitioner states that he has never withdrawn his appeal before the board and neither will he at any time (2) Petitioner will fully explore all the administrative and judicial remedies available to him.

(emphasis added).

On September 27, 2006, the BIA construed Akinyele's Motion to Reopen as a Motion to Reconsider the BIA's order granting the Motion to Withdraw. The BIA then granted the Motion to Reconsider and reopened the case on its own motion pursuant to 8 C.F.R. § 1003.2(a). The BIA noted Akinyele's statements regarding an extension of the briefing schedule, but found that he had never filed a formal request for such an extension. Instead of setting a new briefing schedule, the BIA concluded that "a decision on the merits of [Akinyele's] appeal [would] be forthcoming." On October 27, 2006, the BIA dismissed Akinyele's appeal for failure to file a brief which meaningfully apprised the BIA of the reasons for his appeal, instead of issuing a decision on the merits of Akinyele's appeal.

Akinyele appeared before the BIA pro se. Thus, the BIA was required to liberally construe his appeal. *See Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005); *Lim v. INS*, 224 F.3d 929, 934 (9th Cir. 2000) (noting that "pro se appellant's failure to comply with formal requirements did not justify dismissal"). Additionally, the BIA should look to the content of a motion to determine its

purpose. *See Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005). Although the record does not show that Akinyele followed formal procedures for filing a motion for an extension of the briefing schedule, he did reference such an extension in his Motion to Reopen. The BIA, in fact, acknowledged his statements regarding an extension. Given the liberal standard afforded to pro se petitioners and the fact that the BIA could not find a formal request for an extension of the briefing schedule in the record, the BIA should have construed Akinyele's statements as a request for an extension. However, the BIA failed to do so despite the fact that, due to its content, the BIA construed Akinyele's Motion to Reopen as a Motion to Reconsider.

The majority correctly points out that 8 C.F.R. § 1003.2(a) does not contain any explicit requirement that the BIA set a new briefing schedule when it reopens an appeal. However, the BIA certainly could have set a new briefing schedule as it does when it opens every case. *See* 8 C.F.R. § 1003.3(c)(1). In fact, its failure to do so directly conflicts with at least two previous unpublished cases in which the BIA has issued a new briefing schedule when reopening an appeal. *See In re Guiterrez*, 2005 WL 1111840 (BIA Apr. 21, 2005) (unpublished disposition) (granting a petitioner's motion to reopen and indicating that a new briefing schedule would be set by separate order); *see also In re Yue Fen Tan*, 2003 WL 23508703 n.1 (BIA Dec. 17, 2003) (unpublished disposition) (noting that the BIA

reinstated an appeal in order to set a new briefing schedule because "the parties were deprived of their briefing privilege").

The majority also correctly points out that no regulation requires that the BIA remind the petitioner that the original briefing schedule stands. However, requiring Akinyele to adhere to the original briefing schedule, which required a brief to be filed by September 8, would have been impossible.

At the time the BIA withdrew Akinyele's appeal, Akinyele still had more than two weeks remaining to file his brief. However, Akinyele could not have filed a brief on September 8, 2006, the day on which the brief was due, because the BIA had withdrawn Akinyele's appeal, effectively ending his case and eliminating the briefing schedule. By the time the BIA reinstated Akinyele's appeal approximately three weeks later, the deadline for filing a brief had long since passed. Akinyele was thus in the unenviable position of either attempting to file a brief in a case that did not exist or attempting to adhere to a briefing schedule which would have required him to use a time machine.

In *Singh v. Ashcroft*, 362 F.3d 1164, 1168-70 (9th Cir. 2004), the BIA denied a petitioner's motion to file a late brief after the BIA sent the briefing schedule and transcript to an incorrect address. We held that denying the petitioner an opportunity to file a brief under these circumstances "plainly" violated his due process right to address "perceived inconsistencies" that formed a basis of an IJ's

denial of asylum. *Id*. at 1168 (citing *Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir. 2003)). Although *Singh* is clearly distinguishable on its facts, I believe that its holding applies here.

The IJ denied Akinyele's asylum claim at least in part because the IJ found Akinyele incredible. In my view, the BIA's decision to require Akinyele to adhere to an expired briefing schedule, coupled with the BIA's refusal to construe the language in Akinyele's Motion to Reopen as a motion requesting an extension of the briefing schedule, deprived Akinyele of his "opportunity to address the credibility determination before the BIA, in briefing and in argument." *Manimbao*, 329 F.3d at 660. Thus, the BIA "plainly" violated Akinyele's due process rights. *Singh*, 362 F.3d at 1168. I would remand to the BIA with instructions to issue a new briefing schedule. I therefore respectfully dissent.